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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 01 229 51935 Office: Vermont Service Center Date: JUN 19 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Acting Reg. Comm. 1977). Here, the petition's filing date is July 25, 1997. The beneficiary's salary as stated on the labor certification is $12.16 per hour or $25,292.80 per annum.

Counsel initially submitted copies of the petitioner's bank statements for the period from December 1996 through December 1997,

and a copy of the petitioner's 1997 Form 1120 U.S. Corporation Income Tax Return which reflected gross receipts of $224,646; gross profit of $164,090; compensation of officers of $62,000; salaries and wages paid of $12,506; and a taxable income before net operating loss deduction and special deductions of -$7,153.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On September 17, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted a copy of the beneficiary's W-2 which showed he was paid $6,300 in 1997 and a letter from the petitioner's CPA which stated:

> Please note that the corporate income tax return reflects a taxable income of -$7,153.00, which is not necessarily indicative of the corporation's financial position or its financial ability to pay its expenses or debts. It should be noted that the taxable income is computed after deducting non cash charges for depreciation of $10,138, and amortization in the amount of $576. It should also be noted that gross revenues for that period were $224,646.

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petitioner accordingly.

On appeal, counsel submits another letter from the petitioner's CPA and bank statements for the period from January 31, 1997 through December 31, 1997 and argues that the petitioner's "corporate bank statements reflect monthly ending balances, which combined with W-2 salary paid to alien and adjusted income of $3,561.00, are clearly demonstrative of ability to pay the wage noted."

Counsel's argument is not persuasive. As noted by the director:

> Your response included a letter from your accountant requesting the consideration of $10,138.00 in depreciation and $576.00 in amortization expenses. Even when considering these amounts as available funds to compensate the beneficiary, the adjusted income of $3,561.00 is still insufficient to pay the $18,993.00 difference between the wages paid to the beneficiary in 1997 and the wage specified on the Form ETA-750.

The petitioner's Form 1120 for the calendar year 1997 shows a taxable income of -$7,153. The petitioner could not pay a proffered wage of $25,292.80 per year out of a negative income. Therefore, the petitioner has not established its ability to pay the proffered wage based upon its net income or its net assets.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.